IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

74-115

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., C

MARY STEWART POWELL, PETITIONER

vs.

WILLIAM K. ROGERS, Deputy Commissioner, United States Employees' Compensation Commission, 13th Compensation District; STATE COMPENSATION INSURANCE FUND,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN RIORDAN
RIORDAN & GOLDSMITH
507 Polk Street, Suite 310
San Francisco, California
94102
(415) 928-2333

Counsel for Petitioner

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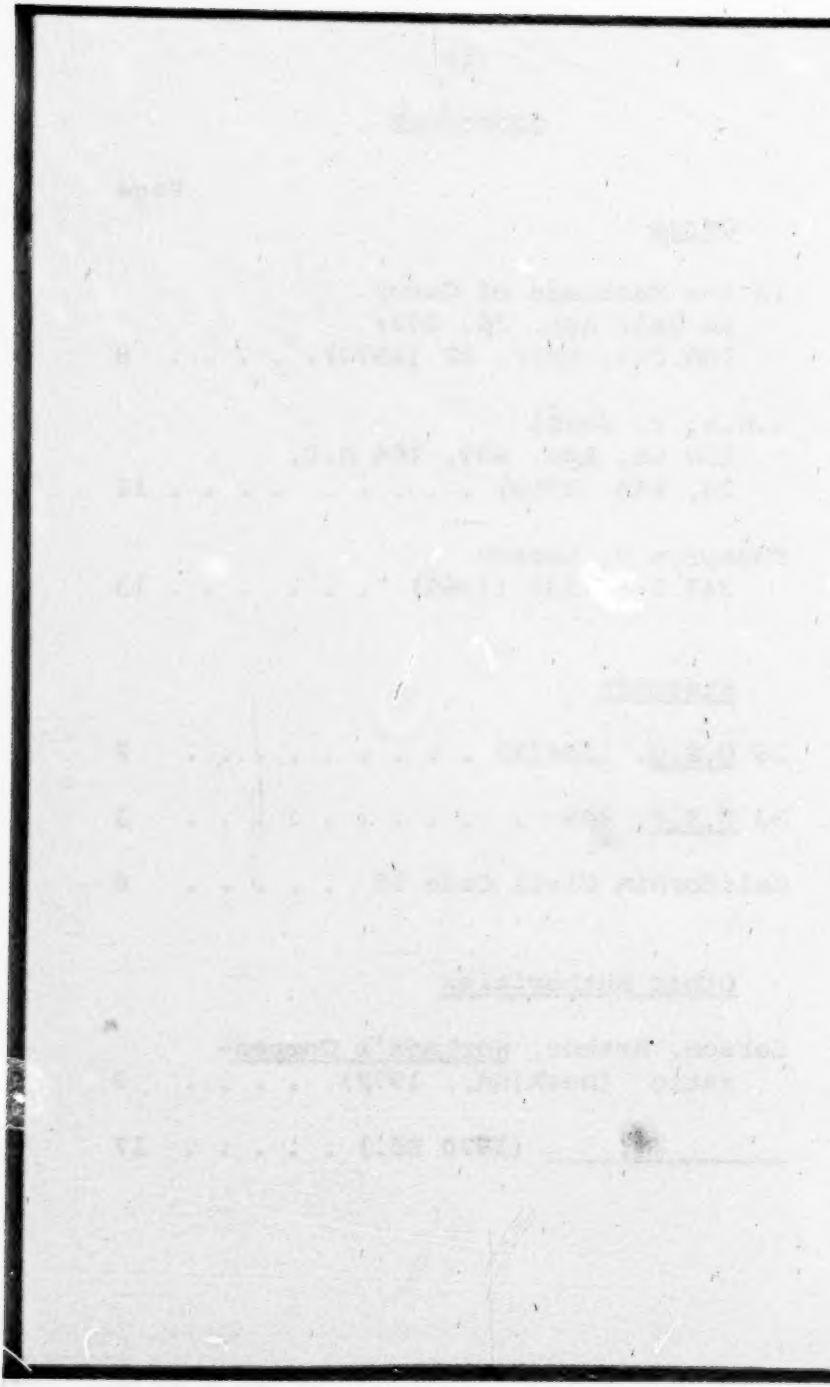

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Petitioner, MARY STEWART POWELL, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 16, 1974.

OPINION BELOW

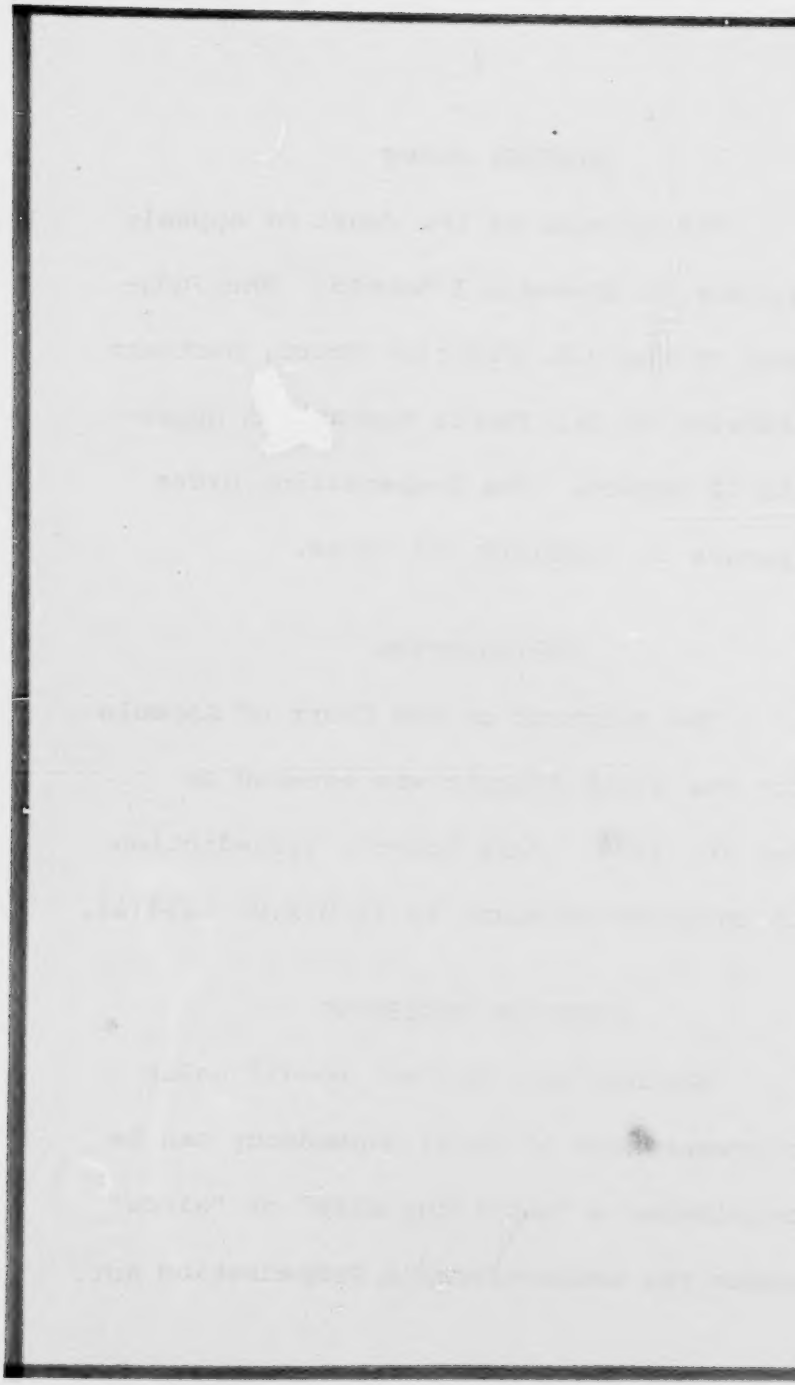
The Opinion of the Court of Appeals appears in Appendix I hereto. The Judgment of the U.S. District Court, Northern District of California appears in Appendix II hereto. The Compensation Order appears in Appendix III herto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 16, 1974. This Court's jurisdiction is involved pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Mary Stewart Powell under circumstances of total dependency can be considered a "surviving wife" or "widow" under the Longshoreman's Compensation Act.



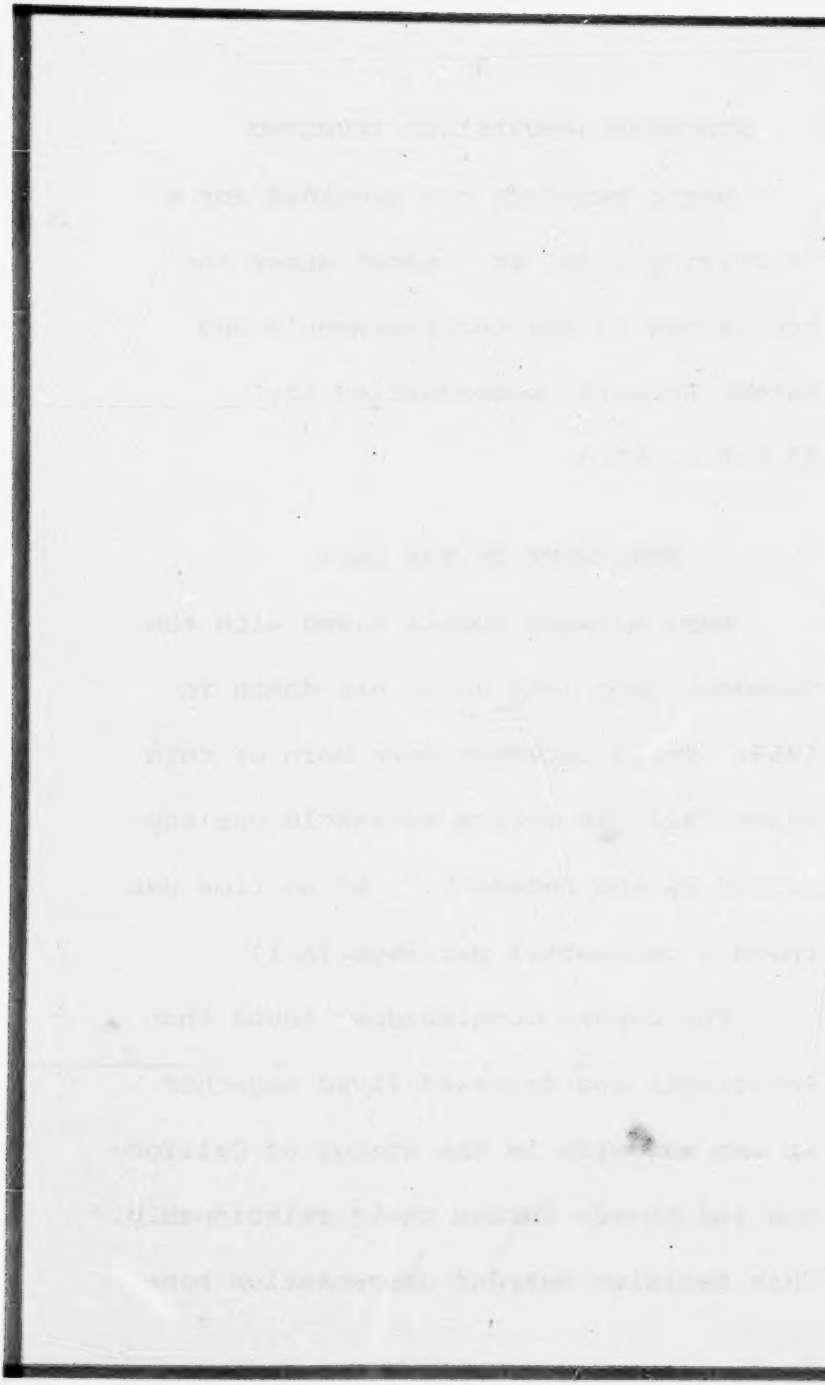
STATUTORY PROVISIONS INVOLVED

Death benefits are provided for a "surviving wife" or "widow" under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. #909.

STATEMENT OF THE CASE

Mary Stewart Powell lived with the decedent from 1955 until his death in 1969. Three children were born of this union "and the entire household was supported by the decedent." At no time was there a ceremonial marriage.(A-I)

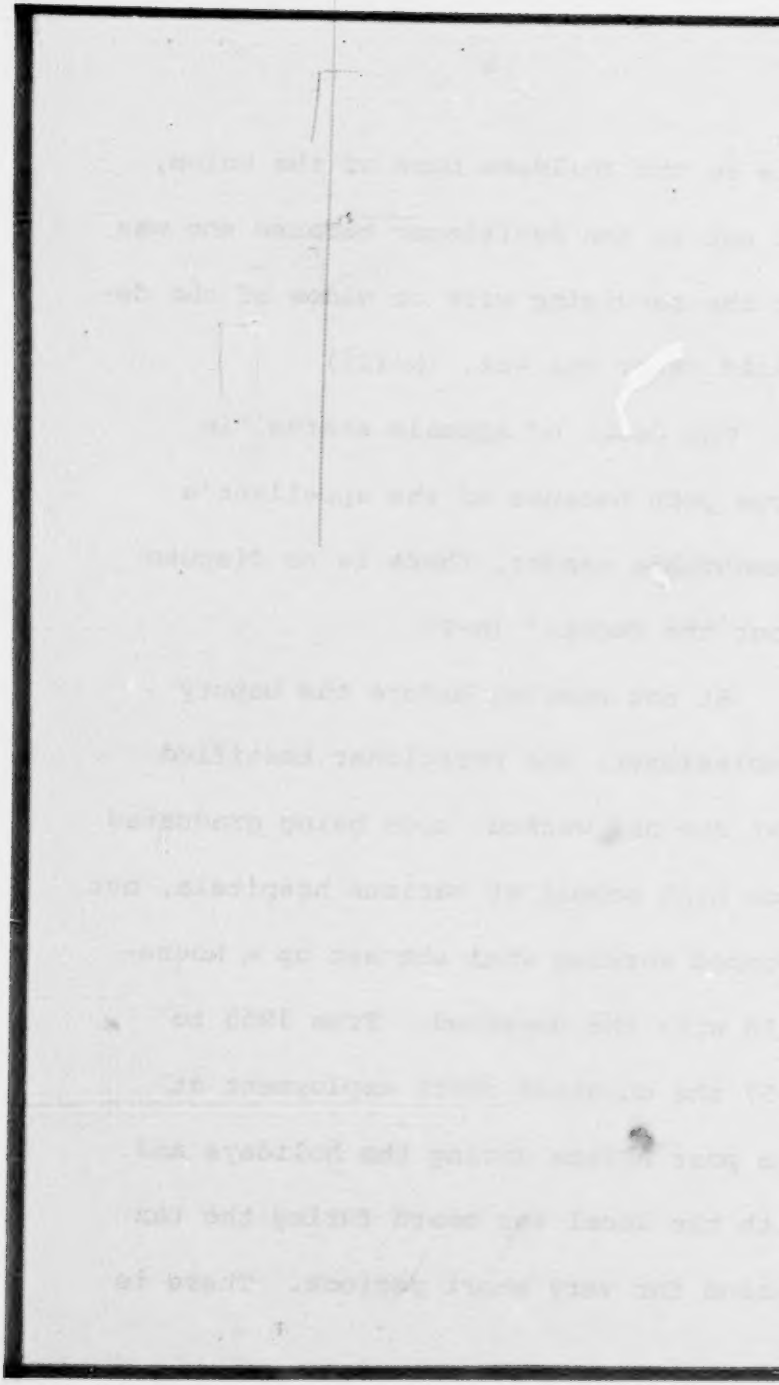
The Deputy Commissioner found that Petitioner and deceased lived together as man and wife in the states of California and Nevada during their relationship. This decision awarded compensation bene-



fits to the children born of the union, but not to the Petitioner because she was not the surviving wife or widow of the deceased under the Act. (A-III)

The Court of Appeals states "in large part because of the appellant's commendable candor, there is no dispute about the facts." (A-I)

At the hearing before the Deputy Commissioner, the Petitioner testified that she had worked upon being graduated from high school at various hospitals, but stopped working when she set up a household with the deceased. From 1955 to 1957 she obtained short employment at the post office during the holidays and with the local tax board furing the tax season for very short periods. There is



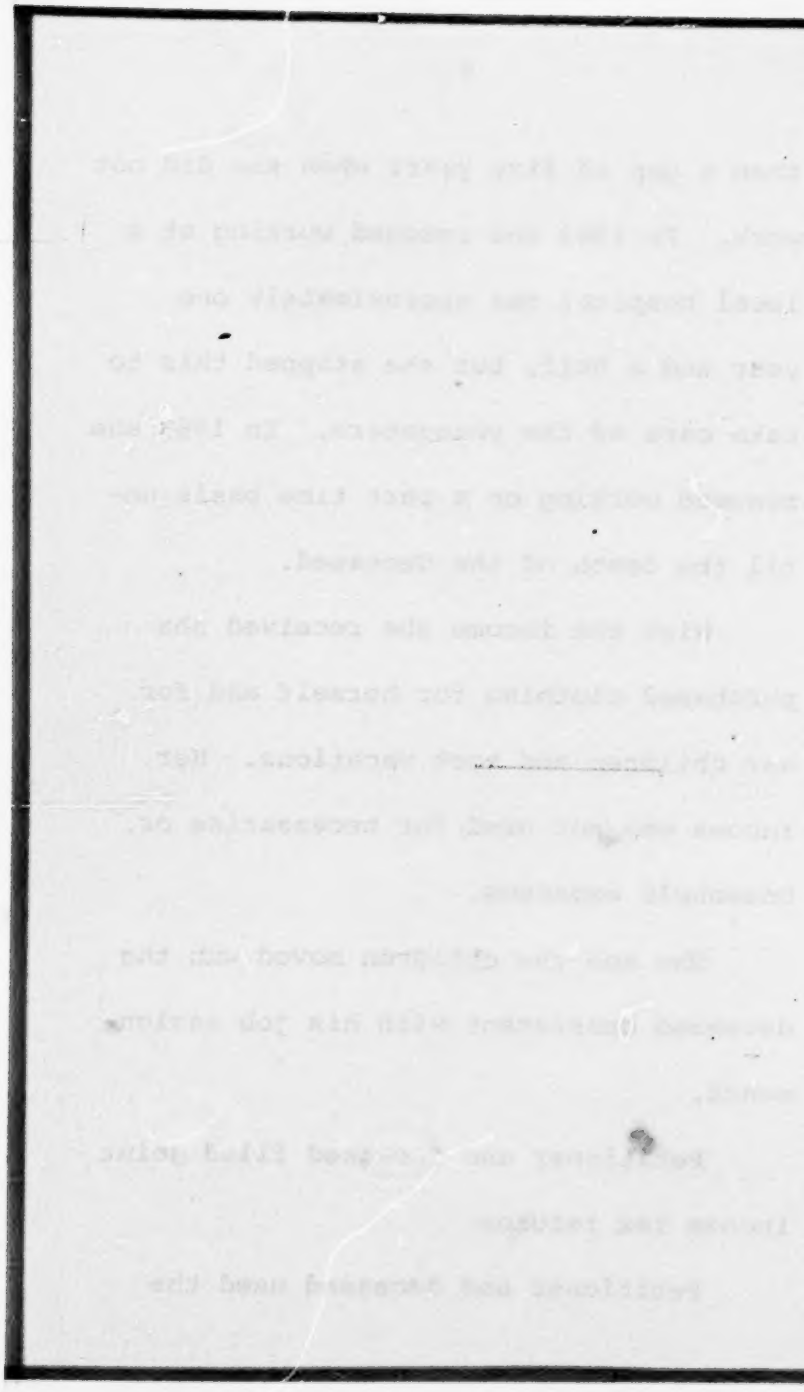
then a gap of five years when she did not work. In 1963 she resumed working at a local hospital for approximately one year and a half, but she stopped this to take care of the youngsters. In 1968 she resumed working on a part time basis until the death of the deceased.

With the income she received she purchased clothing for herself and for her children and took vacations. Her income was not used for necessaries or household expenses.

She and the children moved with the deceased consistent with his job assignments.

Petitioner and deceased filed joint income tax returns.

Petitioner and deceased used the

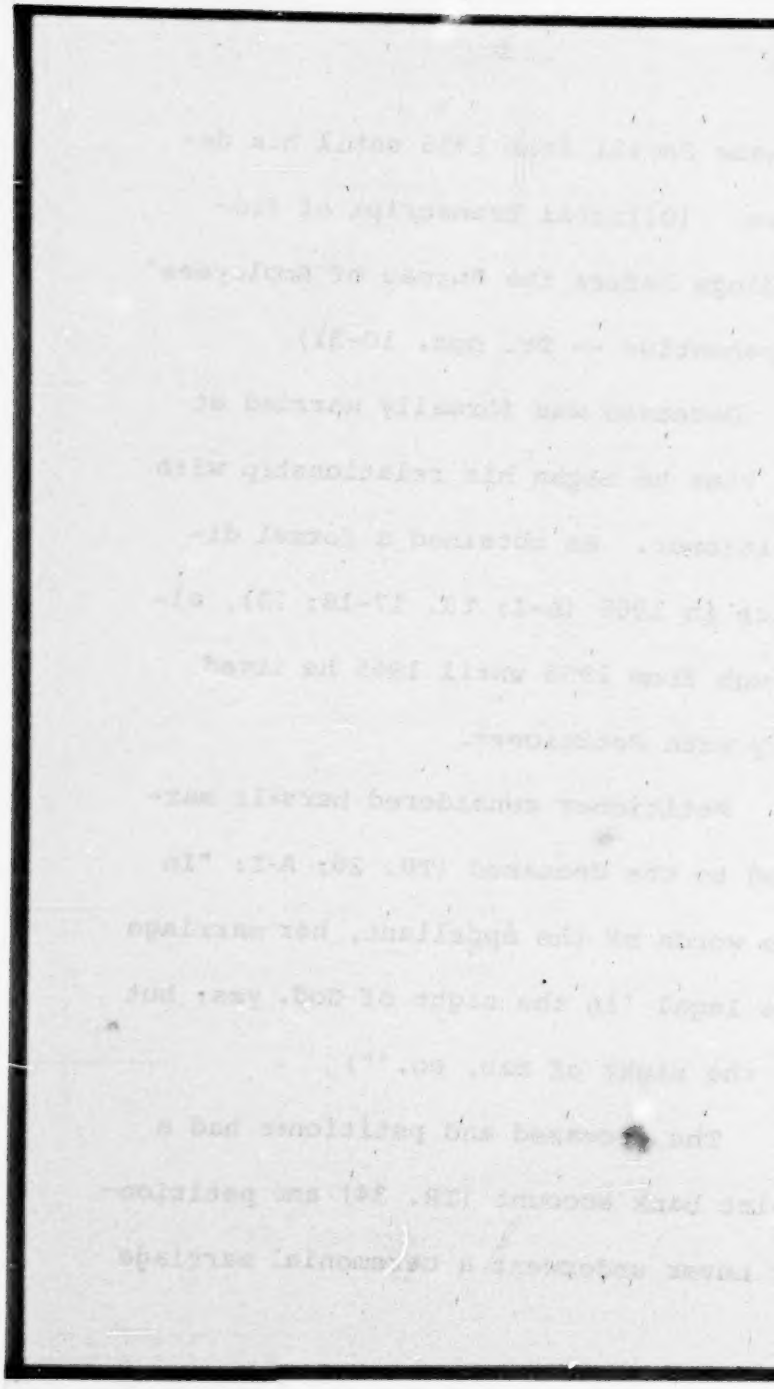


surname Powell from 1955 until his decease. (Official Transcript of Proceedings before the Bureau of Employees' Compensation -- Tr. pps. 10-31)

Deceased was formally married at the time he began his relationship with Petitioner. He obtained a formal divorce in 1965 (A-I; TR. 17-18; 23), although from 1955 until 1965 he lived only with Petitioner.

Petitioner considered herself married to the deceased (TR. 26; A-I: "In the words of the appellant, her marriage was legal 'in the sight of God, yes; but in the sight of man, no.'")

The deceased and petitioner had a joint bank account (TR. 34) and petitioner never underwent a ceremonial marriage



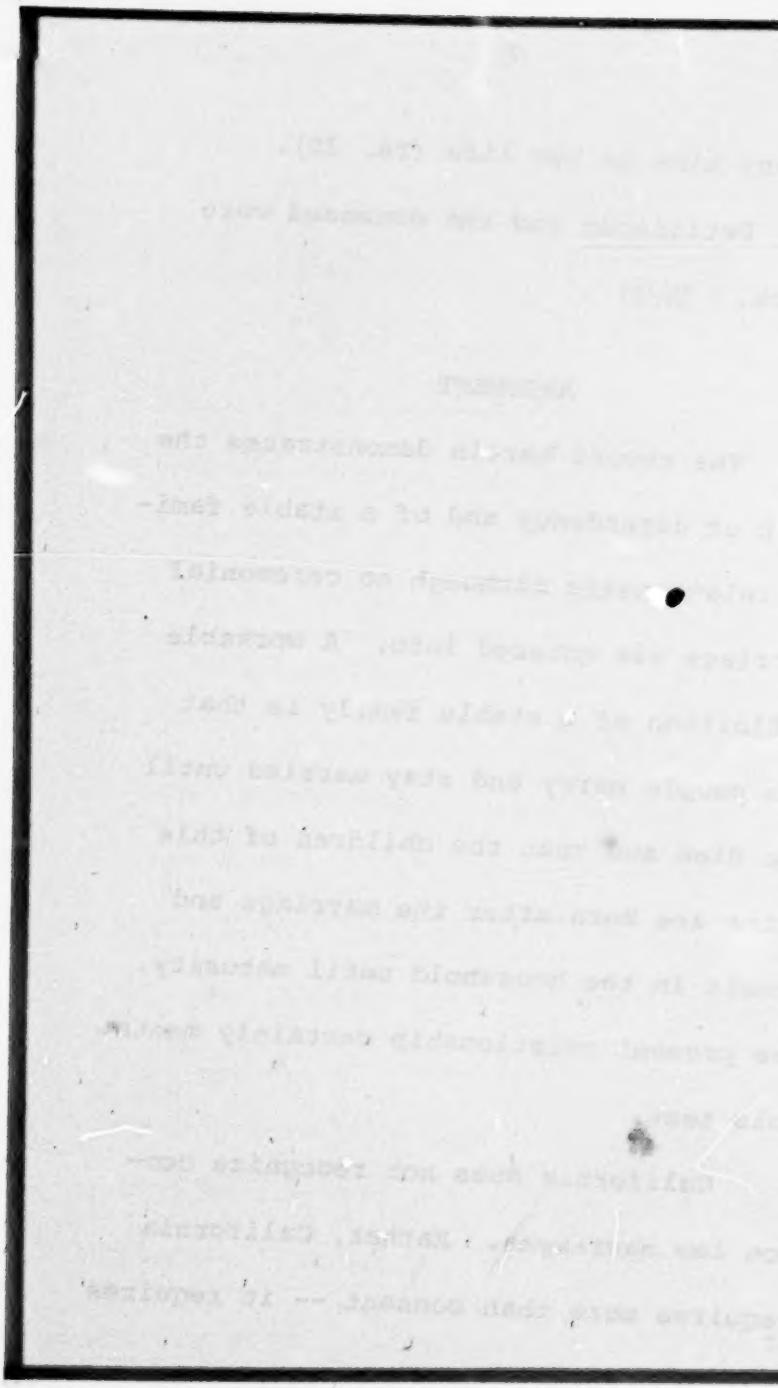
at any time in her life (TR. 35).

Petitioner and the deceased were Black. (A-I)

ARGUMENT

The record herein demonstrates the fact of dependency and of a stable family relationship although no ceremonial marriage was entered into. A workable definition of a stable family is that two people marry and stay married until one dies and that the children of this union are born after the marriage and remain in the household until maturity. The present relationship certainly meets this test.

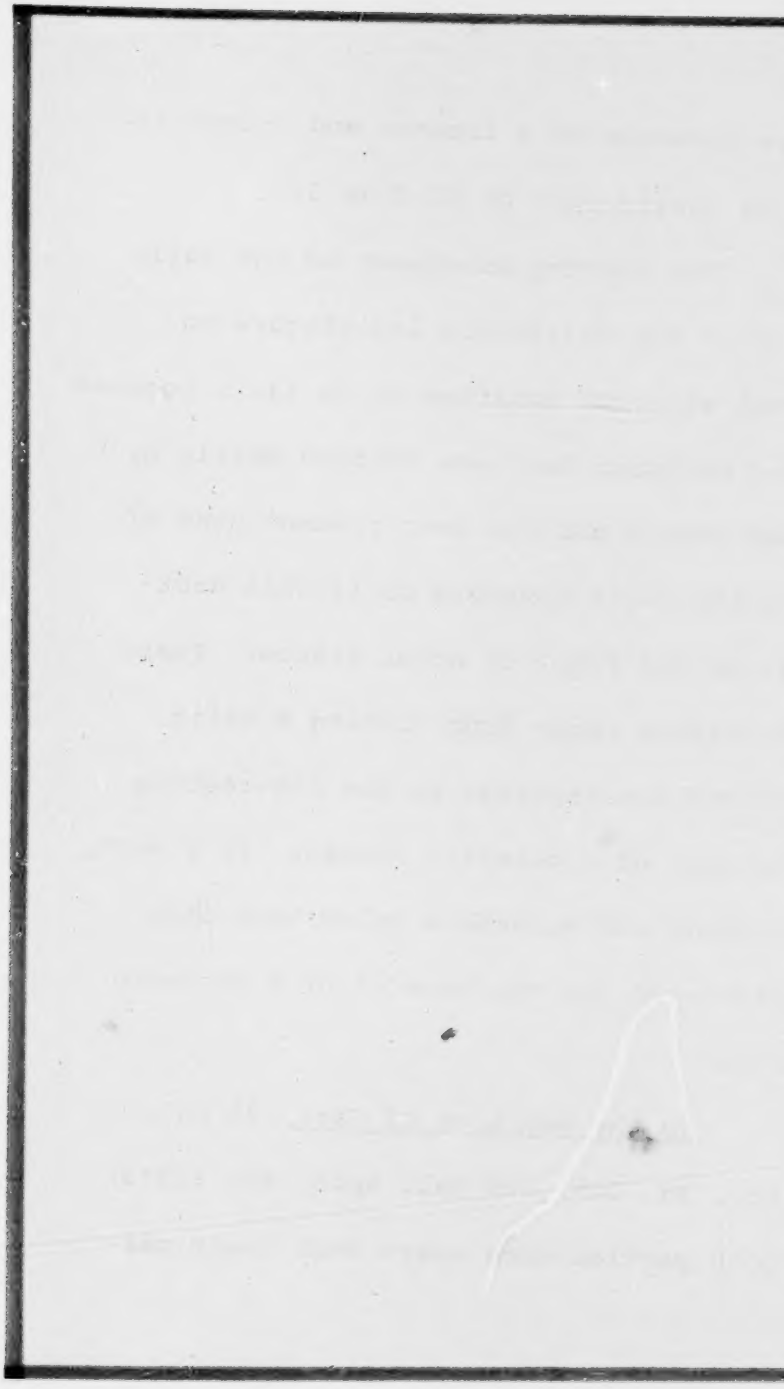
California does not recognize common law marriages. Rather, California requires more than consent -- it requires



the issuance of a license and solemnization (California Civil Code 55).

The seeming harshness of the failure of the California legislature to deal with the equities of de facto spouses and children has been handled fairly by the courts and the ever present hand of equity fills numerous California decisions and those of other states. These decisions range from finding a valid common law marriage to the interesting concept of a putative spouse. In a word, liberal and equitable rules have been fashioned for the benefit of a de facto wife.

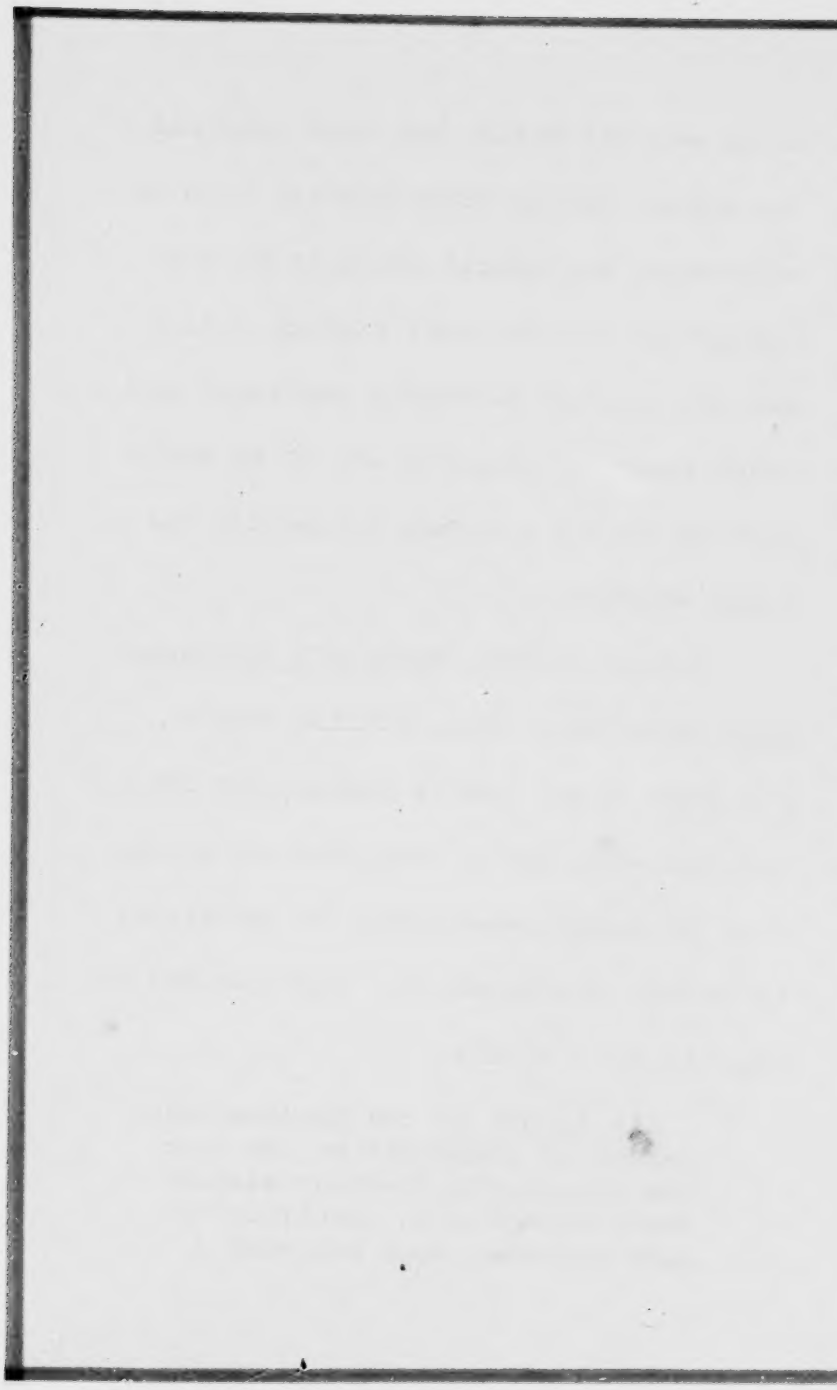
In the Marriage of Cary, 34 Cal. App. 3d. 345, 109 Cal. Rptr. 862 (1973) both parties were aware that their mar-



riage was not valid, but they acquired "an actual family relationship, with cohabitation and mutual recognition and assumption of the usual rights, duties and obligations attending marriage" and found that the property was to be dealt with as though a formal ceremonial marriage existed.

Arthur Larson, Workmen's Compensation (Desk Ed., 1972, Matthew Bender, New York, N.Y.) neatly summarizes the problem existing in this factual situation of actual dependency vs. morality. He writes (Citations omitted) Sec.#63.40, pps. 11-19 - 11-21):

> It is one of the fundamental tenets of compensation law that the claimant's fault or misconduct, except when specifically made defense, does not work a

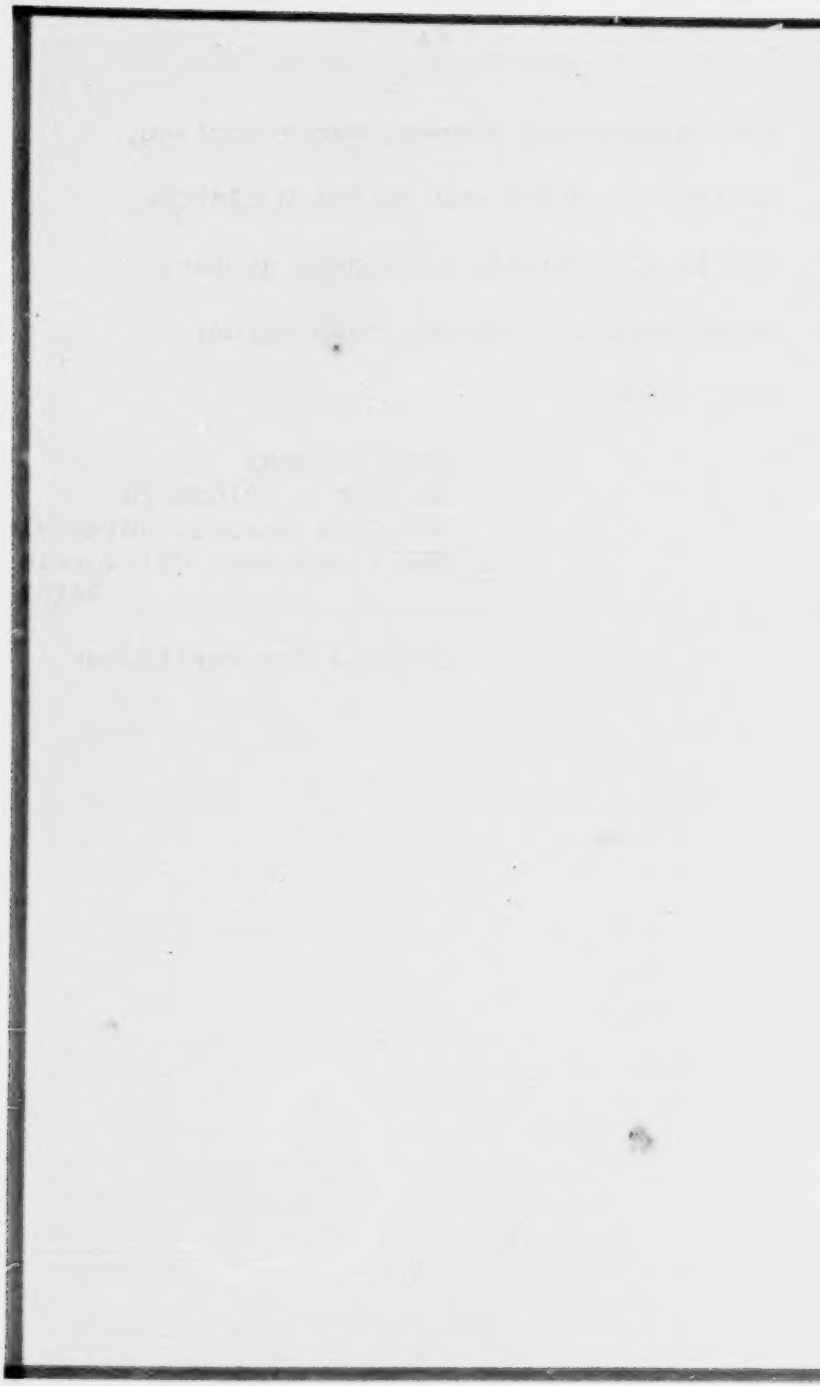


forfeiture of rights to which he is otherwise entitled. The application of this tenet to the issue of dependency would necessitate the conclusion that a showing of actual dependency may not be defeated by proof of the immoral character of the relationship out of which the dependency grew. This view, while accepted by some courts, is rejected by others on the ground that it offends public policy and undermines the basic institutions of society. The issue is relatively noncontroversial when the claimant in good faith marries a man who, unknown to her, already has a living wife. It has frequently been held that this relationship plus actual dependency will support an award. The problem assumes more difficult form when the claimant herself knew the facts making the relationship illicit, but nevertheless lived in complete, long-continued, and outwardly respectable dependency on deceased. The facts in a Maryland case illustrate the issue perfectly, and the majority and dissenting opinions likewise illustrate the two conflicting judicial responses evoked by the facts. Claimant, at a time when she was already a widow with five children, met the deceased, who also had been previously married

525 Golden Gate Avenue, San Francisco, California 94102 and Morton Hollander, Judith S. Feigin, Attorneys at Law, Department of Justice, Washington, D.C. 20530.

JOHN RIORDAN
RIORDAN & GOLDSMITH
507 Polk Street, Suite 310
San Francisco, California
94102

Counsel for Petitioner



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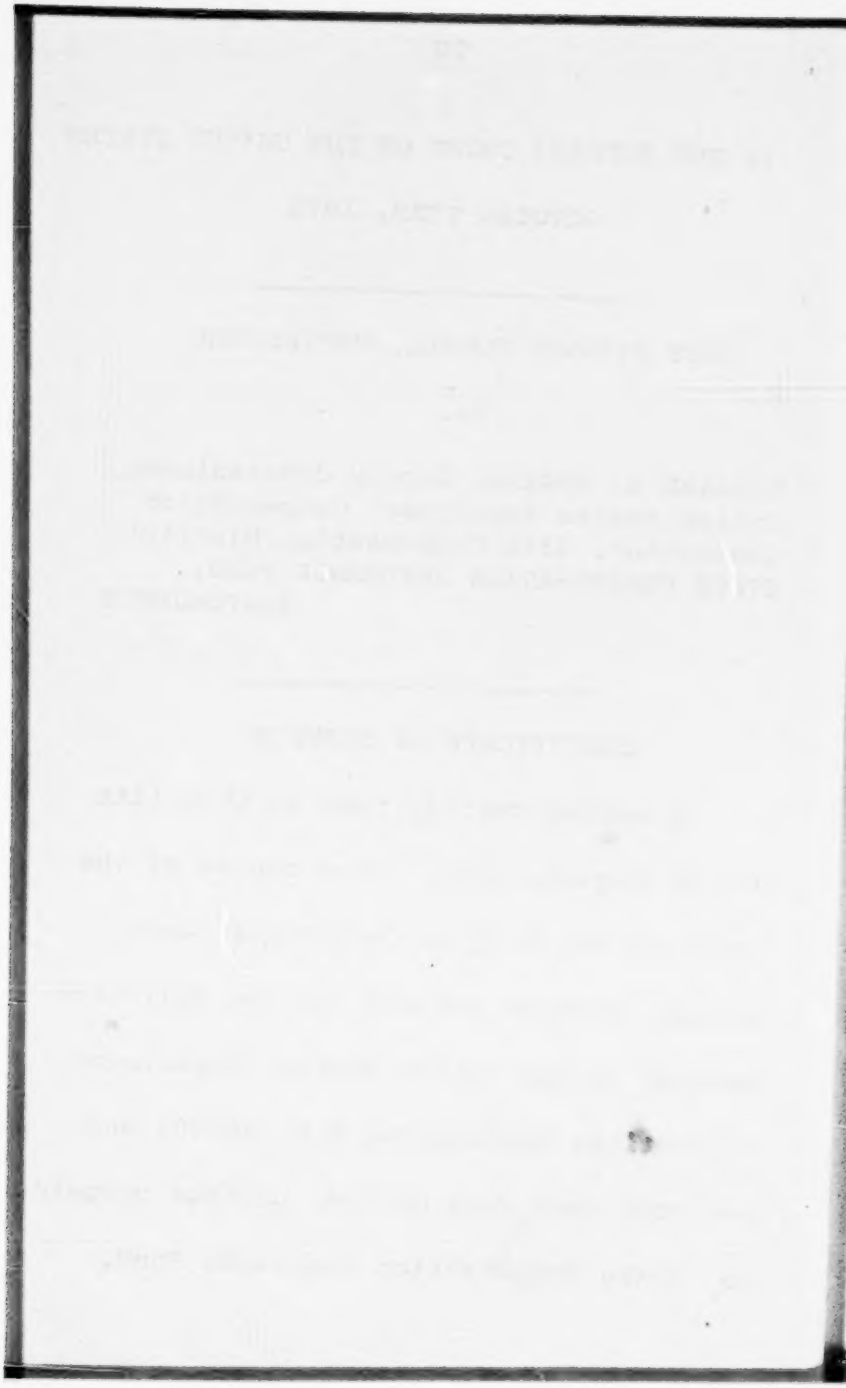
CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 1974, five copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; and one copy each were mailed, postage prepaid, to State Compensation Insurance Fund,

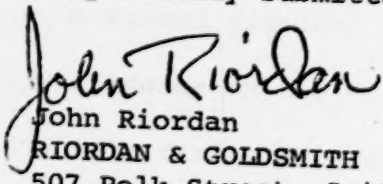


It is respectfully submitted that Petitioner should be found to be entitled to death benefits under the Act under the circumstances and facts of this case.

Dated: August 10, 1974.

San Francisco, California

Respectfully submitted,



John Riordan
RIORDAN & GOLDSMITH
507 Polk Street, Suite 310
San Francisco, California
94102

Counsel for Petitioner

followed the pattern of many persons who do not work (or only on brief occasions) while youngsters are growing up. All support came from the deceased. The relationship was long and stable. Historic and social reasons are present in the instant situation where a formal marriage (and, in fact, a formal divorce) are not of primary significance in the creation or termination of a family relationship. Here, the deceased played the role of father and husband. He was the guardian and protector and the male link between his children and wife and the rest of the community.

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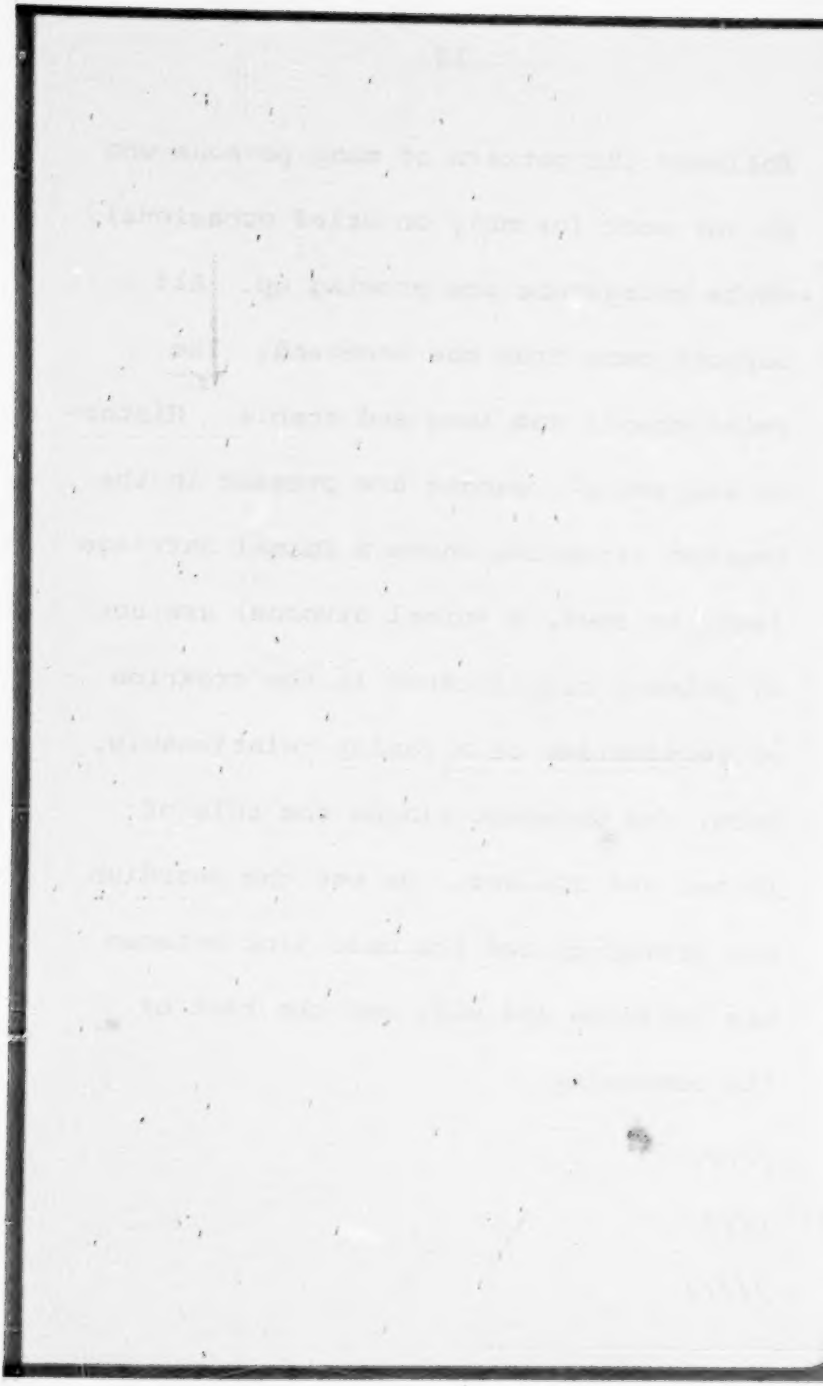
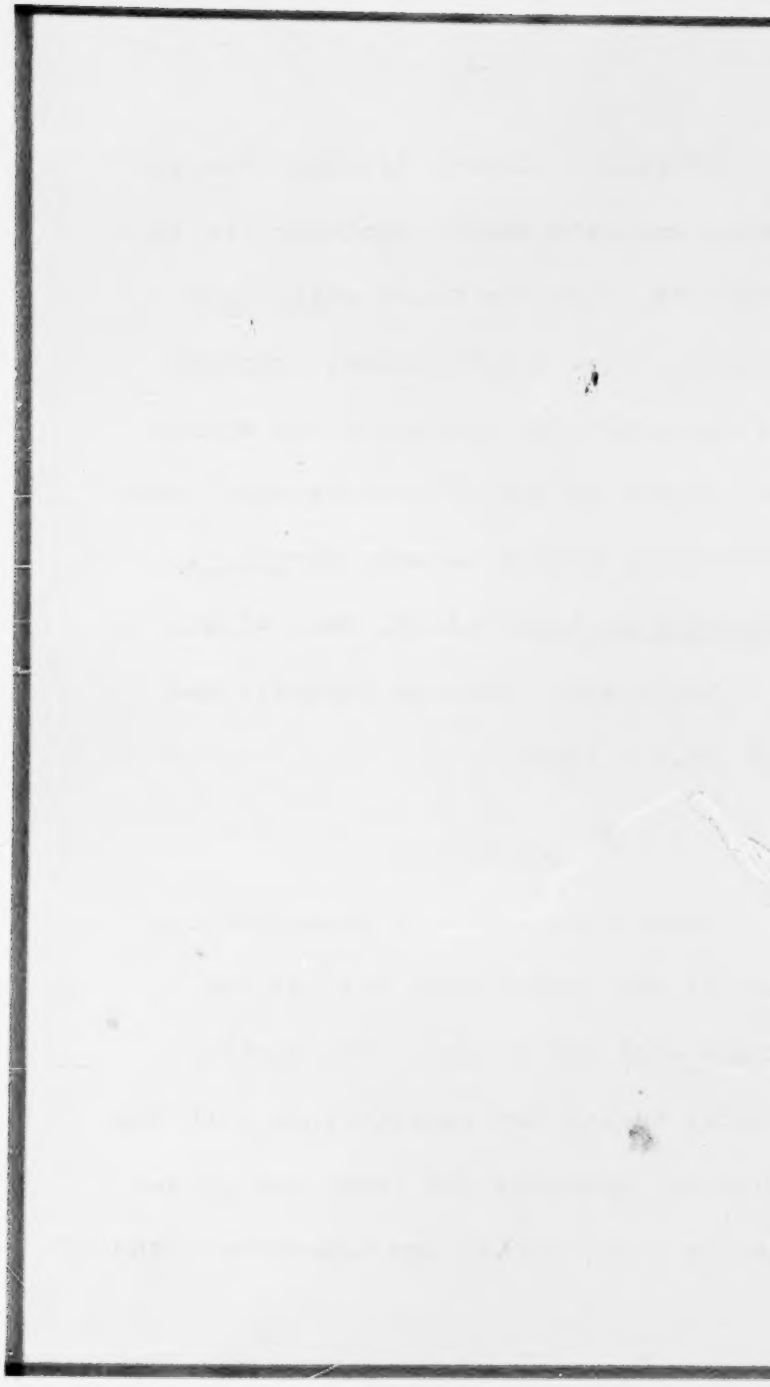


Professor Larson, drawing upon the Hearst and Silk cases, contends, it is submitted, that the Court will, upon occasion, view a traditional concept and definition to implement the spirit and purpose of social legislation. See discussion, Arthur Larson, Workmen's Compensation Law, Vol.IA, Sec. 43.41, pps. 628 - 631, (Matthew Bender), New York, N.Y., 1970.

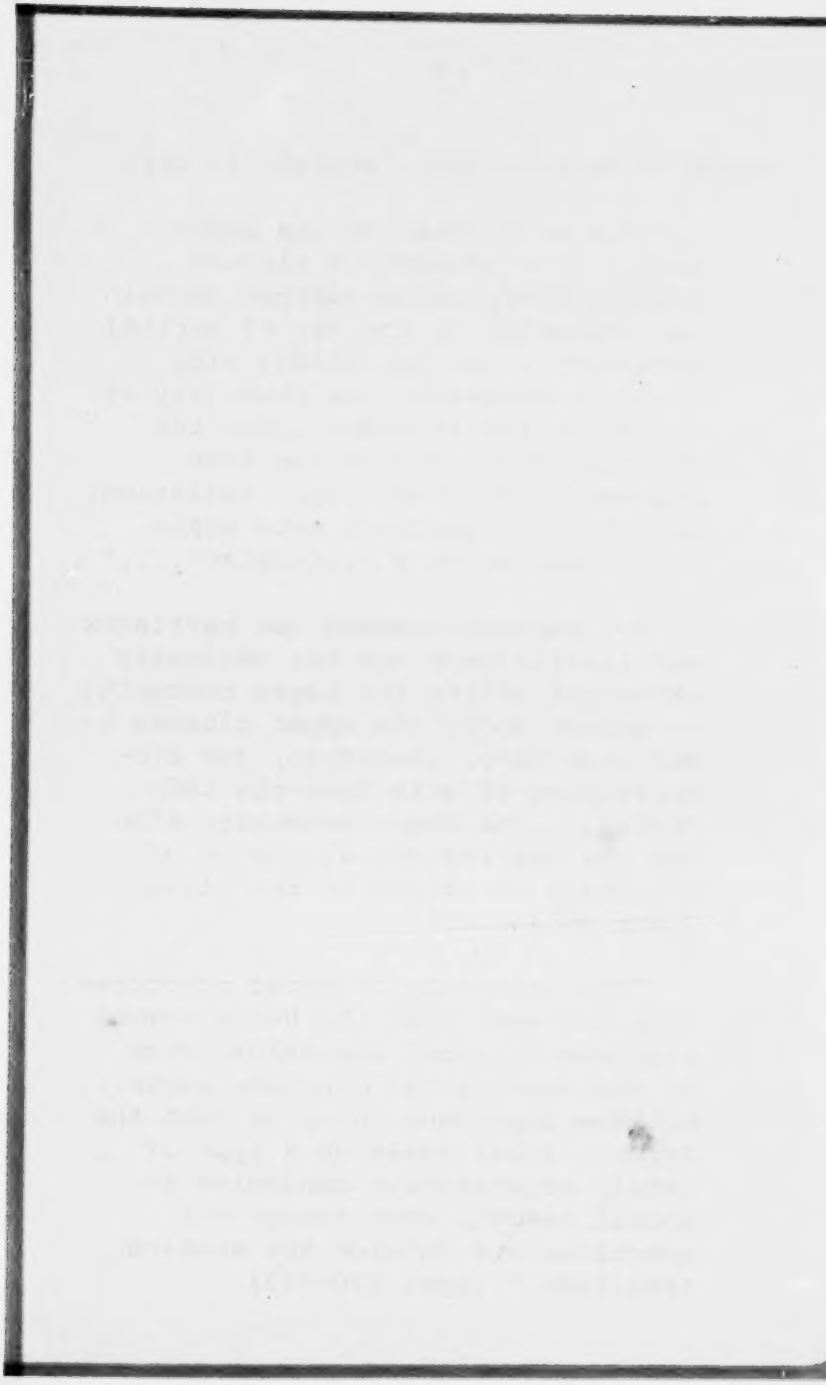
CONCLUSION

Instantly, there is presented the case of the traditional role of the modern wife and mother. She worked briefly during her relationship with the deceased, spending the remainder of her time as wife, mother and homemaker. She



(Harper & Bros.), 1944, states, in part:

> "The uniqueness of the Negro family is a product of slavery... After slavery there emerged certain new obstacles in the way of marital stability...Yet coincident with these developments the stability of the Negro family grew....But the starting point was so low that Negroes never caught up. Isolation, poverty and ignorance were again the obstacles to acculturation...."
>
> "...Further, common law marriages and illegitimacy are not seriously condemned within the Negro community -- except among the upper classes -- and they have, therefore, few disorganizing effects upon the individual....The Negro community also has the healthy social custom of attaching no stigma to the illegitimate child...."
>
> "The existence of these practices does not mean that the Negro community has no moral standards, even in the traditional American sense... but the important thing is that the Negro...(has) built up a type of family organization conducive to social health, even though the practices are outside the American tradition." (pps. 930-935)



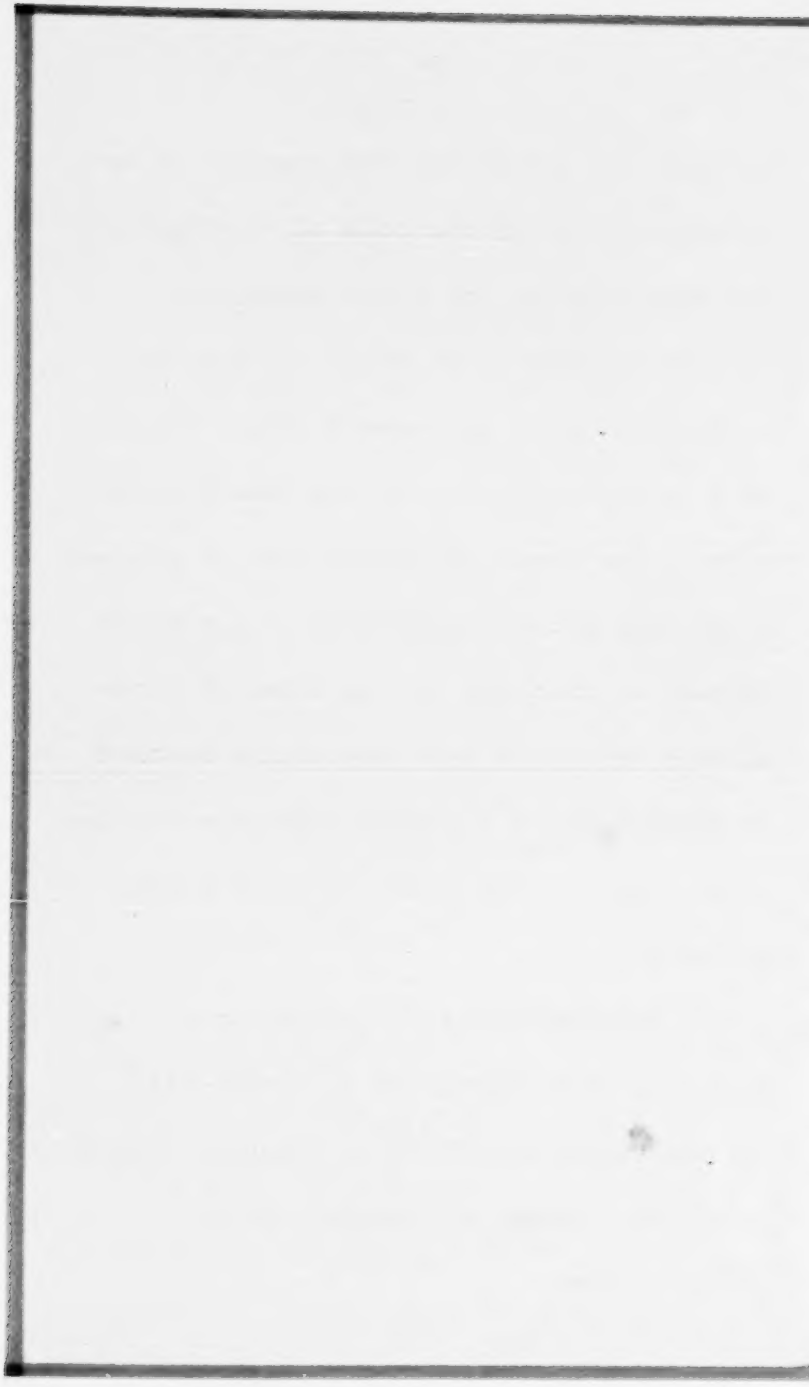
It is submitted that the experience of slavery and post-Civil War discrimination and poverty must be considered in viewing the approach of Blacks to formal ceremonial marriage. It is respectfully submitted that a ceremonial marriage is not as significant a factor in a family relationship as it is with some others. There is not the same "stigma" assigned to a youngster born to a union where there is not a ceremonial marriage in the Black community as in some White communities (See Daniel P. Moynihan, The Negro Family: The Case of National Action, Office of Policy Planning and Research, U.S. Dept. of Labor, March 1965).

Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy,

history and sociology are crucial to an understanding of the role of the family and marriage in the Black community.

To suggest that these factors be considered does not assert there should be a different rule for the Black community. The issue is solely one of whether there was actual dependency -- and one factor to consider is the view of ceremonial marriages and importance thereof in establishing a stable family relationship. Again, the issue is only actual dependency.

Administratively, producing a marriage certificate is of great help in the event conflicting "spouses" claim benefits. That, of course, is not present here.



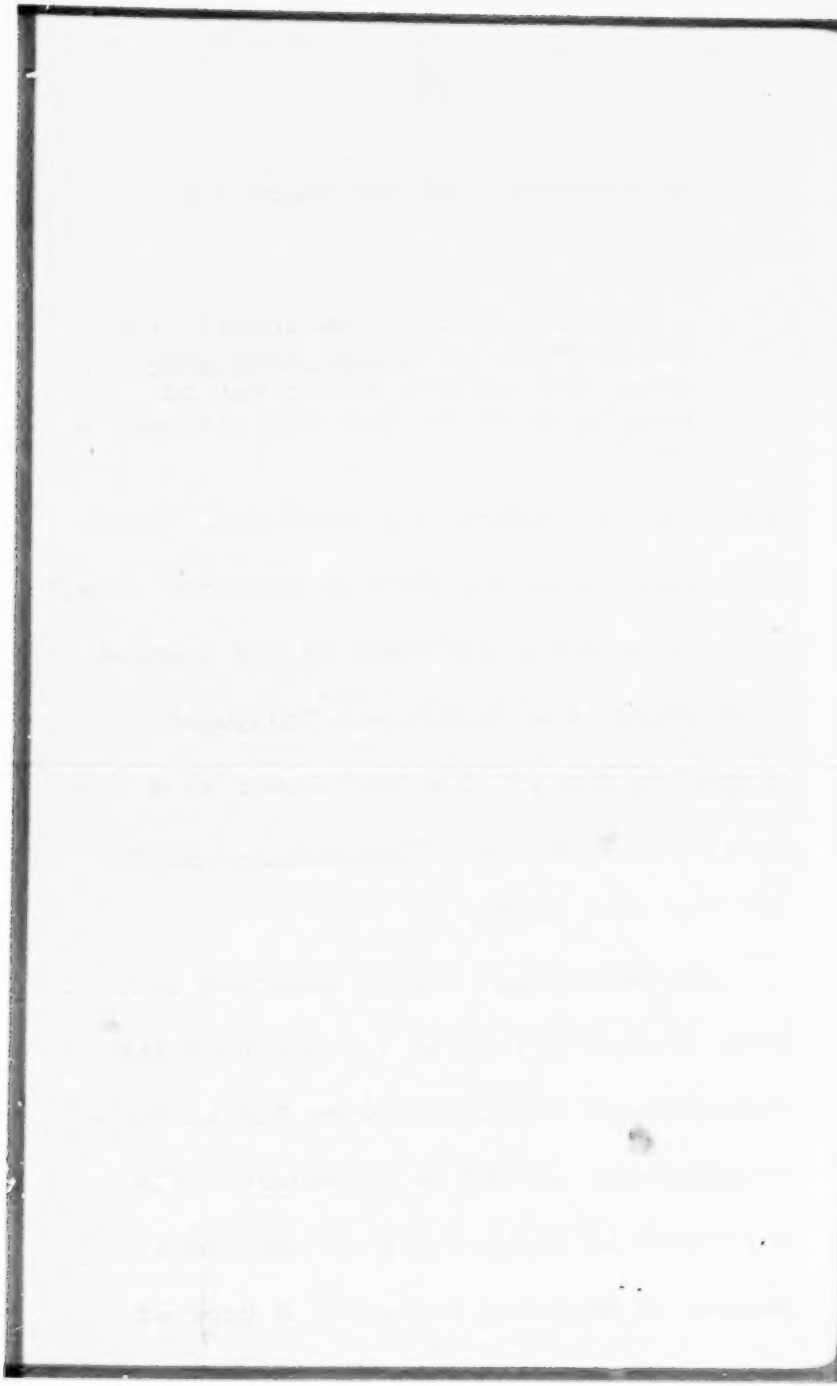
He stresses that the board and court:

> "Should confine the inquiry to the question of actual dependency under the Act and should not go looking under or into the claimant's bed."

Any other procedure, he concluded, "casts this court into the role of Keystone Cops."

It is submitted that in the instant case there is a sufficient "conjugal nexus" to qualify the Petitioner as a surviving wife under Thompson v. Lawson, 347 U.S. 334 (1965).

An additional factor injected into this factual situation is that both the deceased and Petitioner were Black. This circumstance should be considered with reference to the history of the Black person in American society. A page of



> theory that "dependency" has no moral content and that courts may not read into the act moral disqualifications which the legislature has not seen fit to impose. The dissent argued that the general purpose of the Act did not include the "endowment of illicit relationships," and concluded with a ringing phrase worthy of a Jonathan Edwards: "We are not at liberty to ascribe to the legislature an intent to upset fundamentals still recognized by law and society (however often transgressed by individuals), in order to take the children's bread and cast it to the dogs."

In a comparable case, I.N.A. v Jewel, 118 Ga. App. 599, 164 S.E. 2d 846 (1968) Hall, J. stated in his dissent:

> "There is no provision under the Act which states that the claimant forfeits his or her rights under the Act for violating sex laws, alcholic beverage laws, traffic laws, gambling laws, etc." (at p. 850)

but had been divorced. He seems to have proposed marriage, but claimant declined on account of religious scruples. Instead, they set up housekeeping together, and deceased supported claimant and her two minor children for something like ten years. She was generally known in the neighborhood by his name, and the whole arrangement appears to have been as cozy, happy, and respectable as one could wish, except, of course, that one important detail, that of marriage, was missing. Note that there was here no legal impediment to the marriage, no bigamy, and no adultery. In fact, there may have been nothing beyond a housekeeping arrangement, but, since courts are usually supposed to believe the worst in situations of this kind, the case was handled on the assumption of the existence of an immoral relationship. The Maryland statute had been amended in 1947 to remove not only the conclusive presumption of dependency for widows and children but also the limitation of dependents to named classes; the new statute merely said that all questions of dependency shall be determined in accordance with the facts. Applying this statute, the court reversed the Commission's denial of benefits, on the simple